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No. 299

In the Supreme Court of the United States

OCTOBER TERM, 1958

THE CUBA RAILROAD COMPANY, PETITIONER,

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
Assistant Attorney General,
ROBERT N. ANDERSON,
JOSEPH KOVNER,
Attorneys,
Department of Justice,
Washington 25, D. C.

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This case arises out of a suit by the petitioner for a refund of 1943 income taxes in the amount of $33,506.83. (R. 3-5.) The Government first defended on the ground that the suit was barred by a settlement agreement executed in 1949. (R. 33-38.) The district court, holding that the settlement lacked necessary binding formalities, overruled this defense, allowing petitioner to maintain the suit, subject, however, to the Government's right to a set-off for any deficiencies due for petitioner's 1943 income taxes otherwise barred by the statute of limitations. (R. 63-68, 124 F. Supp. 182.) Thereupon the Government filed its answer, including

a set-off in excess of the amount of petitioner's refund claim. (R. 70-74.) On petitioner's challenge by motion for summary judgment (R. 76), the district court again upheld the Government's right to a set-off.[1] Finally, on cross-motions for summary judgment (R. 149, 156), the court held the full amount of the set-off to be good, and entered judgment dismissing the complaint. (R. 158.)

The judgment was affirmed by the court of appeals on April 18, 1958. (Pet. 7-10, R. 161-166, 254 F. 2d 280.) A petition for rehearing (R. 168-173) was denied on May 14, 1958 (R. 174), and on the same day, the clerk of the court of appeals entered an according order. (R. 175.) The petition for a writ of certiorari was filed in this Court on August 22, 1958.

The petition for a writ of certiorari, filed 100 days after the date of the denial of the petition for rehearing, is clearly out of time. Petitioner's reference to a "final judgment" of May 27, 1958 (Pet. 2) is not supported by anything in the transcript of the record certified to this Court by the clerk of the court below,[2] and in any case, the date of the denial of the petition for rehearing is the controlling date. *Gypsy Oil Co.* v. *Escoe*, 275 U.S. 498; *United States* v. *Ellicott*, 223 U.S. 524, 539.

In any event, there is no occasion for further review of the decision below. Petitioner's first contention

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[1] The district court, another judge sitting at this juncture, at first denied the right to a set-off, but on re-argument withdrew this order. (R. 137-143, 135 F. Supp. 847.)

[2] On May 27, 1958, an order on the judgment of the court of appeals was entered in the district court. It is presumably that order of the district court to which petitioner refers.

(Pet. 4-5), that the Government's set-off must be confined to the same transaction as that covered by the refund claim, is plainly erroneous.[3] The rule is settled that a taxpayer's suit for a refund of income taxes for any given year opens to inquiry his entire income tax liability for that year, and the Government's set-off is not confined to the specific item or transaction on which the refund claim is based. *Lewis* v. *Reynolds*, 284 U.S. 281; *United States* v. *Memphis Cotton Oil Co.*, 288 U.S. 62, 70; *Roybark* v. *United States*, 218 F. 2d 164, 165 (C.A. 9th); *United States* v. *Pfister*, 205 F. 2d 538, 541 (C.A. 8th); *Routzahn* v. *Brown*, 95 F. 2d 766, 769 (C.A. 6th); *Thurman* v. *Studebaker Corp.*, 88 F. 2d 984, 987 (C.A. 7th); *Nye* v. *United States*, 84 F. 2d 457, 464 (C.A. 1st). The case of *Rothensies* v. *Electric Storage Battery Co.*, 329 U.S. 296, relied upon by petitioner, is not in point and in no way qualifies the forgoing rule; it simply holds that where *more than one year* is involved, the period of an equitable adjustment for inconsistent taxation of the same transaction will be confined to the tax years involving the one transaction.

Petitioner's second contention (Pet. 5-6), that it may sue for a refund of taxes in disregard of a purported

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[3] The refund claim is based upon an alleged accrual in 1943 of Cuban taxes paid after contest in 1950. (R. 3-5.) The set-off is based upon the erroneous allowance of a deduction for interest in 1943 that was neither accrued nor paid in that year. (Pet. 10.)

settlement agreement but enforce the settlement to bar any set-off against its refund claim, is manifestly without merit.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.
CHARLES K. RICE,
Assistant Attorney General.
ROBERT N. ANDERSON,
JOSEPH KOVNER,
Attorneys.

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